UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF VERMONT

ENTERGY NUCLEAR VERMONT YANKEE, LLC and ENTERGY NUCLEAR OPERATIONS, INC.,	)	
Plaintiffs,	)	
v.	)	Docket No. 1:11-cv-99
PETER SHUMLIN, in his official capacity as GOVERNOR OF THE STATE OF VERMONT; WILLIAM SORRELL, in his official capacity as the ATTORNEY GENERAL OF THE STATE OF VERMONT; and JAMES VOLZ, JOHN BURKE, and DAVID COEN, in their official capacities as members of THE VERMONT PUBLIC SERVICE BOARD,	)	
Defendants.	)	

PLAINTIFFS' REPLY IN FURTHER SUPPORT OF THEIR MOTIONS FOR RELIEF FROM JUDGMENT UNDER RULE 60(b), FOR INJUNCTION PENDING APPEAL, AND FOR AN "INDICATIVE RULING" ON THEIR RULE 60(b) MOTION

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Plaintiffs respectfully submit this reply in further support of their motions for (1) relief from the Judgment under Fed. R. Civ. P. 60(b); and (2) an injunction pending appeal.

INTRODUCTION

These motions have been necessitated by actions and statements of Vermont officials that, on the eve of the expiration of Vermont Yankee's ("VY") current CPG on March 21, 2012, question central premises of this Court's Decision & Order of January 19, 2012 ("Decision"). On February 22, 2012, the Vermont Public Service Board ("PSB") issued a request for comments that expressly questioned two central premises of this Court's Decision: (1) that VY may continue to operate and to store spent nuclear fuel ("SNF") derived from such operations after March 21, 2012, pending PSB action upon Plaintiffs' petition for a new certificate of public good ("CPG"); and (2) that no *legislative* approval is required under the invalidated Act 74 for VY to store SNF at the site derived from post-March 21, 2012 operation. The PSB thus raised the very spectre this Court sought clearly to avoid in its Decision: namely, that Vermont would require VY to cease operation on March 21, 2012, causing the shutdown of VY and the loss of the jobs of the more than 600 employees who work there. Plaintiffs promptly filed motions seeking relief from this Court on February 27, 2012.

On March 8, 2012, the Vermont Attorney General ("AG") filed an "opposition" stating his agreement with the Vermont Department of Public Service ("DPS") that "Entergy may continue to operate Vermont Yankee under the terms of its current CPG until the Board rules on Entergy's CPG petition." Opp. 3. Plaintiffs were optimistic, in light of this concession, that they might be able to withdraw their motions. But the next day, March 9, 2012, the PSB Defendants stated at a PSB status conference that the AG had spoken only for the AG and the DPS, *not* for the PSB. *See* Tr. of PSB Proceeding [Draft] 63:6-10, 23-25, Mar. 9, 2012 (Adams Reply Decl. Ex. A) (PSB Chairman Volz: "I'm guessing there's a reason … why the Attorney General

specified the Department and the Attorney General didn't specify anyone else …. We [*i.e.*, the PSB] still have to sort this out on our own, which is what we're planning to do."); *id.* at 63:18-22 ("[A]n agreement by the Department and the Attorney General's Department…doesn't confer jurisdiction on us or authority on us that we could then grant to you. So, you know, we still have to sort this out on our own, which is what we're planning to do.").[1]

The PSB's continued questioning of the AG's and DPS's position that the status quo of continued operation should be preserved pending orderly decision on Plaintiffs' petition for a new CPG directly threatens Plaintiffs' ability to operate VY after March 21, 2012, and leaves Plaintiffs no choice but to press forward with their motions before this Court and thus to file this reply. A statement from the PSB—in direct conflict with this Court's Decision—that Plaintiffs may not operate during the interim period stands irreparably to damage Plaintiffs' ability to keep VY open and to retain critical employees. Plaintiffs respectfully submit that this Court should grant the relief requested by their motions so that such irreparable harm is avoided.

Nor is it Plaintiffs that have caused the urgency of these motions on the very eve of the expiration of the existing CPG on March 21, 2012. The PSB was delayed in resolving Plaintiffs' petition for a new CPG by the presence of Vermont statutory provisions that this Court has now found to be federally preempted. *See* Tr. of PSB Proceeding, 44:2-4, Nov. 10, 2010 (Adams Reply Decl. Ex. B) (Chairman Volz: "We're not going anywhere [in Docket No. 7440 on Plaintiffs' petition for a new CPG]. The Legislature says we can't issue an order."). Absent those invalid provisions, the PSB would almost certainly have provided a final answer before

[1] In light of Chairman Volz's statement that the AG's opposition did not speak on behalf of the PSB, Plaintiffs filed on March 13, 2012, a motion with the PSB seeking, *inter alia*, a declaration from the PSB that VY may continue operating after March 21, 2012, and that the General Assembly need not approve the storage of SNF derived from post-March 21, 2012 operation of VY. Unlike the motions before the Court, which raise issues of federal law, the PSB motion primarily raises issues of state law.

March 21, 2012, on Plaintiffs' CPG petition, which was timely filed in 2008. Plaintiffs should not be penalized for a delay caused by the State's enactment and enforcement of preempted laws.

ARGUMENT

Plaintiffs first summarize the two central premises of this Court's Decision that the PSB has called into question, and how the prospect of negative answers from the PSB stands irreparably to harm Plaintiffs. Plaintiffs then respond to the AG's specific arguments.

I. THIS COURT'S DECISION PROVIDED THAT VERMONT YANKEE SHOULD BE PERMITTED TO OPERATE AFTER MARCH 21, 2012, WHILE THE PSB CONSIDERS ITS PETITION FOR A NEW CPG, AND THAT CONTINUED OPERATION NECESSITATES CONTINUED STORAGE OF SNF

This Court's Decision squarely addressed two issues that the PSB has now called into question on the eve of the March 21, 2012 expiration of Plaintiffs' current CPG.

First, this Court did not issue an injunction providing that Plaintiffs could operate VY (and store SNF derived from such operation) after March 21, 2012, pending the PSB's determination of Plaintiffs' petition for a new CPG, only because the Court viewed such an injunction as unnecessary as Vermont law already provided such relief. *See* Decision 8 ("Vermont law provides that a license subject to an agency's notice and hearing requirements does not expire until a final determination on an application for renewal has been made.") (citing 3 V.S.A. § 814). The AG and DPS agree that § 814(b) provides this relief. *See* Opp. 11 ("[G]iven the Court's decision, § 814(b) applies and Entergy may continue to operate under the terms of its current CPGs while its CPG petition remains pending at the Board."). The PSB, by contrast, while not yet definitively expressing its view, has suggested that it may disagree with this fundamental premise. *See, e.g.*, Ex. A at 13:7-9 (Chairman Volz: "[H]ow does Section 814 expand that amount or allow for the expansion of that amount [of SNF]?"); *id.* at 60:7-9 ("How does 3 V.S.A. Section 814 extend a deadline set in a condition of the sale approval?").

The PSB's suggestion is wrong, and this Court's and the AG's (and the DPS's) understanding of § 814(b) is correct, because none of the statutory provisions or orders invoked by the PSB expressly purports to trump this background rule of administrative law. But even if this premise were incorrect as a matter of Vermont law, an injunction under *federal law* to effectuate this Court's judgment is appropriate. Plaintiffs should not be penalized for the PSB's delay in processing Plaintiffs' timely filed 2008 petition for an amended or new CPG, which delay resulted solely from the presence in Vermont's statutory law of provisions that have now been invalidated as federally preempted. *See* Ex. B at 44:2-4 (Chairman Volz: "We're not going anywhere. The Legislature says we can't issue an order.").

Second, on the issue of legislative approval for storage of SNF, this Court viewed 10 V.S.A. § 6522(c)(4) as "the only provision in Chapter 157 which requires approval of any kind to store fuel beyond March 21, 2012." Decision 79 n.27. This view is correct because § 6522(c)(4) is the only provision to mention "the approval of the general assembly." Section 6522(c)(2), which states that any CPG issued by the PSB for construction of an SNF-storage facility must limit the storage to "the amount derived from operation of the facility up to, but not beyond, March 21, 2012," is a vestige of the now-invalidated Act 74 regime, under which (a) the PSB was allowed to approve the construction or establishment of a SNF storage facility at VY and, if it granted such approval, was required to limit the quantity of SNF stored on site to the amount derived from operation until March 21, 2012; and (b) the General Assembly assumed control of storage of SNF derived from post-March 21, 2012 operation under § 6522(c)(4). With the General Assembly's authority under the latter provision invalidated, neither the PSB nor the General Assembly retains direct authority over storage of SNF derived from post-March 21, 2012 operation. The AG and DPS agree with this reasoning. S*ee* Opp. 10 ("[G]iven the Court's

injunction directed at the last sentence of § 6522(c)(4), § 6522(c)(2) does not restrict the Board's authority to consider Entergy's petition for a renewed CPG for storage of spent fuel at Vermont Yankee."). But the PSB has expressed its potential disagreement in a way that threatens to use the General Assembly's purported authority over SNF storage to stop operation of VY. *See* Ex. A at 15:4-5, 7-11 (Chairman Volz: "[T]hat one sentence was struck from 6522(c)(4). … But there are other parts of Chapter 157 which gives the Legislature authority over the storage of all kinds of different kinds of waste that hasn't been struck."); *id.* at 15:22-24 ("Isn't the Board's authority on 10 V.S.A. Section 6522 constrained?"). Had the PSB's suggested interpretation been correct under Vermont law, then this Court would have invalidated § 6522(c)(2) along with § 6522(c)(4) because both are contained in Act 74, which is federally preempted as impermissibly regulating nuclear safety. Accordingly, this Court should grant relief by (1) clarifying that it did not view § 6522(c)(2) as requiring legislative approval for storage of SNF derived from post-March 21, 2012 operations; and (2) in the event the PSB's suggested statutory interpretation is correct, invalidating § 6522(c)(2) as preempted by federal law.

The very real prospect that the PSB will answer its own questions adversely to Plaintiffs, and thus order that VY must cease operation or storage of SNF from operation after March 21, 2012, stands irreparably to harm Plaintiffs. Plaintiffs would then be forced to cease operation or to operate in defiance of the PSB's opinion. Plaintiffs would face the possibility of, *inter alia*, a diminished credit rating, a loss of critical employees, *see* Pls.' Mem. Of Law In Support Of Their Expedited Mot. For An Inj. Pending Appeal, ECF No. 190, at 11-13, and a demerit in their application for a new CPG, since the PSB has suggested that interim operation it deems unlawful will weigh against granting a new CPG, *see* Ex. A at 70:5-11 (Chairman Volz: "If Entergy Vermont Yankee's continued operation of Vermont Yankee is not in compliance with any

applicable Board orders or Vermont laws, would that be a relevant consideration in the Board's determination of whether to grant Entergy Vermont Yankee a Section 231 CPG?").

II. THE ATTORNEY GENERAL FAILS TO OFFER ANY BASIS TO DENY PLAINTIFFS' MOTIONS

Because the PSB has asserted that the AG does not speak for the PSB in stating that VY may continue operating (and storing SNF) after March 21, 2012, the motions should be granted to preserve the status quo. The AG's arguments in opposition are unpersuasive.

A. Plaintiffs Have Shown Extraordinary Circumstances

The AG asserts (Opp. 3) that Plaintiffs have not shown that the PSB's questions regarding Plaintiffs' ability to continue operating VY (and storing SNF from such operations) after March 21, 2012, give rise to extraordinary circumstances. The AG relies in large part on its concession (that Plaintiffs may engage in such operation and storage), but, as noted above, the PSB has stated that it is not bound by that concession. Even though the PSB has not given a final answer to its own questions, the PSB's raising of such uncertainty on the very eve of a prospective March 21, 2012 shutdown itself stands irreparably to harm Plaintiffs. Given that the questions were answered by this Court's Decision in Plaintiffs' favor, this Court should grant the motions to protect Plaintiffs from such harm. *See* Prelim. Inj. Hr'g Tr., 169:8-12, June 23, 2011 (Adams Reply Decl. Ex. C) (John T. Herron: "The whole issue of, of running a nuclear power plant is to have a schedule, is to have certainty, and is to stay disciplined to that process, and, when we start to move this around, you deviate from that, and you create uncertainty, and you create safety issues when you do that.").

B. Plaintiffs Do Not Seek This Court's Oversight Of The PSB's Processes

The AG misconstrues (Opp. 4) Plaintiffs' motions as a request for this Court to exercise ongoing oversight of the PSB's processes. To the contrary, as explained above, the PSB has

called into question two central issues that this Court already resolved, but as to which further clarification from the Court is necessitated by the PSB's questions. Contrary to the AG's suggestion (Opp. 5), the PSB has suggested that it does not view this Court as having decided those questions. None of the AG's cited cases (Opp. 4-5) involved a state agency that, within its own proceeding, called into question issues already resolved by a federal court's judgment.

C. Plaintiffs' Failure To File A Rule 59(e) Motion Is Irrelevant

The AG does not respond to Plaintiffs' explanation that the Rule 60(b) motion is timely because it was filed within the deadline for filing a notice of cross-appeal, *see* Pls.' Mem. Of Law In Support Of Their Mot. For Relief From Judgment Under Rule 60(b), ECF No. 194, at 4-5 n.6, and the AG (Opp. 5-6) cites no authority holding that failure to file a Rule 59(e) motion requires rejecting a Rule 60(b) motion. Moreover, Plaintiffs saw no need to file a Rule 59(e) motion because this Court's Decision appeared clearly to resolve the questions of the need for legislative approval for SNF storage and whether VY could continue operation (and storage of SNF from such operation) after March 21, 2012. The PSB's unanticipated raising of these questions occurred after the time for filing a Rule 59(e) motion had expired, and Plaintiffs promptly filed a Rule 60(b) motion after the PSB had raised the questions.

D. Plaintiffs' Requested Injunctive Relief Is Not Overbroad

The AG misconstrues (Opp. 6) Plaintiffs' request for injunctive relief as overbroad. To the extent the AG is concerned (Opp. 7) that other state agencies may be constrained by the requested injunction, Plaintiffs are content to narrow their the request as follows: "The Court should enjoin Defendants, [permanently and] pending appeal, from … taking any action designed to, or having the effect of, forcing Vermont Yankee to curtail operations pending a decision by the PSB on Plaintiffs' petition for a CPG for continued operation of Vermont Yankee and storage of SNF derived from such operation, and any judicial review of that

decision, *on the ground that Plaintiffs have not yet received such a CPG*." (Emphasis supplied to words added to request made in Pls.' Expedited Mot. For An Inj. Pending Appeal, ECF No. 190, at 2; *accord* Pls.' Mot. For Relief from Judgment Under Fed. R. Civ. P. 60(b), ECF No. 193, at 2.)

E. The Requested Injunction Against State Officials Is Based On Federal Law And Thus Will Not Violate Sovereign Immunity

The AG contends (Opp. 8) that Plaintiffs' requested injunction seeks enforcement of state law and hence would violate sovereign immunity. The AG's premise is incorrect. Federal law (specifically, the Atomic Energy Act ("AEA")), not state law, requires both the striking of 10 V.S.A. § 6522(c)(2) (if interpreted in the broad way suggested by the PSB) and the grant of an injunction fully to effectuate this Court's invalidation of the preempted Vermont laws that delayed the PSB's resolution of Plaintiffs' CPG petition. Only because this Court construed state law as protecting Plaintiffs in these respects did this Court refrain from granting relief as a matter of federal law; now that this Court's state-law holdings have been called into question, this Court may clearly base the same relief upon federal law. *See, e.g., In re Baldwin-United Corp.*, 770 F.2d 328, 338 (2d Cir. 1985) (courts may grant injunctions "when needed to preserve the court's ability to reach or enforce its decision in a case over which it has proper jurisdiction"); *Dandong v. Pinnacle Performance Ltd.*, No. 10 Civ. 8086, 2011 WL 6156743, at *3 (S.D.N.Y. Dec. 12, 2011) ("courts generally have broad power to issue injunctions to preserve the status quo during a pending litigation") (quotation omitted).

F. The Supremacy Clause Applies To Actions By State Agencies

The AG mistakenly suggests (Opp. 9) that the Supremacy Clause applies only to state laws or regulations, not to actions by a state agency (like the PSB). *See, e.g., Entergy La., Inc. v.*

La. Pub. Serv. Comm'n, 539 U.S. 39, 47 (2003) (state agency's order preempted by federal law); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 963 (1986) (similar).

G. Granting Rule 60(b) Relief Will Simplify The Appeal

Plaintiffs will withdraw their cross-appeal (which addresses only the two issues called into question by the PSB) if this Court grants Rule 60(b) relief. Absent the cross-appeal, it is evident that the Second Circuit's consideration of this case will be simplified.

H. The Prospect Of An Adverse Opinion From The PSB On The Question Of Interim Operation Is Not Speculative

The AG's opposition, drafted before March 9, 2012, sought to assure Plaintiffs that there is no "imminent risk of concrete harm absent an injunction … given the position of the [DPS] and the [AG] that, in light of this Court's decision, Entergy may continue to operate under the terms of its current CPGs while its petition remains pending at the Board." Opp. 13. (While contesting imminence, the AG does not contest that harm from a shutdown or a PSB opinion supporting shutdown would be irreparable.) However, on March 9, 2012, the PSB made clear that it does not necessarily agree with the AG's and the DPS's view. In the event that the PSB ultimately disagrees, Plaintiffs will be forced either to cease operating or, if they defy the PSB by continuing to operate, to face the prospect of a diminished credit rating, a loss of crucial employees, and a demerit in the PSB's consideration of Plaintiffs' petition for a new CPG. This harm is sufficiently likely to support an injunction. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) ("[P]laintiffs seeking preliminary relief [must] demonstrate that irreparable injury is *likely* in the absence of an injunction.").

I. An Injunction Is Necessary To Preserve The Status Quo

The AG concedes that this Court "may modify the injunction to preserve the status quo." Opp. 14. That is exactly the relief Plaintiffs seek. The status quo is that VY is operating and its

600 workers remain employed. The PSB has called into question two central premises of this Court's Decision that go directly to whether Plaintiffs will be able to operate VY after March 21, 2012. Such operation, pending the PSB's ruling on Plaintiffs' petition for a new CPG, is essential so that Plaintiffs are not penalized for the delay that was caused by the presence on Vermont's statute books of two preempted statutes. The AG does not contest that neither it nor the public will suffer harm from interim operation.

CONCLUSION

The Court should (1) declare 10 V.S.A. § 6522(c)(2) and (c)(5) invalid, as preempted by the AEA; (2) enjoin Defendants, permanently and pending appeal, as preempted by the AEA, from enforcing § 6522(c)(2) by bringing an enforcement action, or taking other action, to compel VY to shut down because the "cumulative total amount of spent fuel stored at Vermont Yankee" exceeds "the amount derived from the operation of the facility up to, but not beyond, March 21, 2012"; (3) enjoin Defendants, permanently and pending appeal, as preempted by the AEA, from enforcing § 6522(c)(5), by bringing an enforcement action, or taking other action, to compel VY to curtail operations for failing to comply with that provision; (4) enjoin Defendants, permanently and pending appeal, from taking any action designed to, or having the effect of, forcing Vermont Yankee to curtail operations pending a decision by the PSB on Plaintiffs' petition for a CPG for continued operation of Vermont Yankee and storage of SNF derived from such operation, and any judicial review of that decision, on the ground that Plaintiffs have not yet received such a CPG; and (5) grant such other and further relief as the Court deems appropriate.

Dated: March 14, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this date, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system. The CM/ECF system will provide service of such filing via Notice of Electronic Filing to the following counsel:

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Dated: March 14, 2012

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